

Lim Pah Soon v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-5-01 OF 2012

AZAHAR MOHAMED, ABDUL AZIZ AND ZAWAWI SALLEH JJCA
21 JUNE 2013

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Criminal Procedure — Exhibits — Whether identity of drugs exhibits in doubt — Material discrepancy in gross weight of drugs between weight taken by police and that taken by chemist — Whether prosecution's failure to explain discrepancy fatal — Whether prima facie case against accused not made out — Whether defence should not have been called

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The appellant's instant appeal against conviction and sentence of death for trafficking in 1563g ketamine and 52g nimetazepam — offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') — turned on one issue — a discrepancy in the weight of the ketamine. The police officers who weighed the ketamine after it was seized said the gross weight was 2000g whilst the chemist testified that the weight was 2009.9g. The prosecution failed to explain the discrepancy though the issue was raised during the prosecution's stage of the trial and again during submissions at the close of the prosecution's case. Yet, the High Court held the prosecution had made out a prima facie case against the appellant and called for his defence. The appellant contended that the unexplained discrepancy cast serious doubts on the identity of the drugs exhibits but the trial judge never addressed that issue in his grounds of judgment. The appellant argued that the non-explanation for the discrepancy was fatal to the prosecution's case and it was wrong for his defence to have been called.

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Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

- (1) The appellant should have been discharged and acquitted without his defence being called. Where there was material discrepancy in the weight of the drug exhibit as found by the police and by the chemist, it was incumbent on the prosecution to explain the discrepancy satisfactorily. Affirmative evidence was required to dispel any lingering or remaining reasonable doubt on the identity of the drugs exhibits. The absence of a reasonable explanation gave rise to a reasonable doubt on the identity of the drugs exhibits (see paras 17 & 16).
- (2) The ketamine and nimetazepam in the instant case constituted the very *corpus delicti* of the offence and in sustaining a conviction under s 39B(2)

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- A of the DDA the identity and integrity of the *corpus delicti* must be established beyond reasonable doubt (see para 16).
- (3) The trial judge had a statutory duty to make a specific finding of facts on the material discrepancy issue raised by the appellant. His duty was to ensure this legal obligation was complied with to avoid 'failure of justice' situations. His failure to consider the material discrepancy was a failure to consider a defence which had been put forward. It was the judge's duty to consider the defence no matter how weak it was. The failure to do so was a serious non-direction amounting to a misdirection warranting appellate intervention. The trial judge had failed to appreciate the importance of this issue as it could raise a reasonable doubt on the identity of the offending drugs and hence could raise a reasonable doubt on the prosecution's case (see para 13).
- (4) In accordance with s 180(1) and (4) of the Criminal Procedure Code, it was the bounden duty of trial judges to undertake a positive or maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each essential ingredient of the offence had been established in order to make a finding whether or not the prosecution had made out a *prima facie* case against the accused (see para 12).

[Bahasa Malaysia summary]

- Rayuan perayu ini terhadap sabitan dan hukuman mati kerana mengedar dadah ketamine sebanyak 1563g dan nimetazepam sebanyak 52g — kesalahan-kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') — membangkitkan satu isu — percanggahan dalam berat ketamine. Pegawai-pegawai polis yang menimbang ketamine selepas ia dirampas menyatakan berat kasarnya adalah 2000g sementara ahli kimia memberi keterangan bahawa berat adalah 2009.9g. Pihak pendakwaan gagal untuk menjelaskan percanggahan tersebut walaupun isu tersebut dibangkitkan semasa peringkat perbicaraan pihak pendakwaan dan sekali lagi di akhir kes pihak pendakwaan. Walau bagaimanapun, Mahkamah Tinggi memutuskan pihak pendakwaan telah membuat kes *prima facie* terhadap perayu dan memanggil untuk pembelaannya. Perayu berhujah bahawa percanggahan yang tidak dijelaskan tersebut melemparkan syak wasangka serius ke atas identiti dadah yang diekshibitkan tetapi hakim perbicaraan tidak menangani isu tersebut di dalam alasan penghakimannya. Perayu berhujah bahawa ketiadaan penjelasan untuk percanggahan tersebut adalah serius kepada kes pihak pendakwaan dan adalah salah untuk pembelaannya dipanggil.
- I Diputuskan,** membenarkan rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan perayu:
- (1) Perayu patut dilepaskan dan dibebaskan tanpa pembelaannya dipanggil. Di mana terdapat percanggahan material dalam berat dadah yang

diekhibitkan seperti yang didapati oleh polis dan oleh ahli kimia, adalah wajib ke atas pihak pendakwaan untuk menjelaskan percanggahan tersebut dengan memuaskan. Keterangan afirmatif diperlukan untuk menghilangkan apa-apa keraguan munasabah yang masih ada atau tinggal atas identiti dadah yang diekhibitkan. Ketiadaan penjelasan yang munasabah membangkitkan keraguan munasabah ke atas identiti dadah yang diekhibitkan (lihat perenggan 17 & 16).

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- (2) Ketamine dan nimetazepam dalam kes ini membentuk *corpus delicti* kesalahan dan mengekalkan sabitan di bawah s 39B(2) ADB identiti dan integriti *corpus delicti* mesti dibuktikan melampaui keraguan munasabah (lihat perenggan 16).

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- (3) Hakim perbicaraan mempunyai tugas statutori untuk membuat dapatan spesifik terhadap fakta atas isu percanggahan material yang dibangkitkan oleh perayu. Tugasnya adalah untuk memastikan tanggungjawab undang-undang dipatuhi untuk mengelak keadaan-keadaan 'failure of justice'. Kegagalannya untuk mempertimbangkan percanggahan material adalah kegagalan untuk mempertimbangkan pembelaan yang telah dikemukakan. Adalah tugas hakim untuk mempertimbangkan pembelaan tidak kira betapa lemahnya ia. Kegagalan berbuat sedemikian adalah salah arah serius merupakan salah arah yang mewajarkan campur tangan mahkamah rayuan. Hakim perbicaraan gagal untuk menilai betapa pentingnya isu ini kerana ia boleh membangkitkan keraguan munasabah atas identiti dadah tersebut dan maka boleh membangkitkan keraguan munasabah ke atas kes pihak pendakwaan (lihat perenggan 13).

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- (4) Mengikut s 180(1) dan (4) Kanun Tatacara Jenayah, adalah kewajipan hakim-hakim bicara untuk membuat penilaian positif atau maksima terhadap kredibiliti dan kebolehpercayaan kesemua keterangan yang dikemukakan untuk menentukan sama ada setiap bahan penting kesalahan telah dibuktikan untuk membuat dapatan sama ada atau tidak pihak pendakwaan telah membuat kes prima facie terhadap tertuduh (lihat perenggan 12).]

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Notes

For cases on exhibits, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2035–2036.

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Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)

Balachandaran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

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Davendar Singh all Sher Singh v PP [2012] MLJU 321; [2012] 3 AMR 489, CA (refd)

Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 1135, SC (refd)

- A** *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
- B** *Tan Yew Choy v PP* [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)
Yeong Kia Heng v PP [1992] 1 MLJ 327; [1992] 1 CLJ 364, SC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348, FC (refd)
- C** **Legislation referred to**
 Courts of Judicature Act 1964 s 60
 Criminal Procedure Code s 180(1), (4)
 Dangerous Drugs Act 1952 s 39B(1)(a), (2)
- D** **Appeal from:** Criminal Trial No 45A-217 of 2010 (High Court, Shah Alam)
Hisyam Teh Poh Teik (Salehuddin Saidin with him) (Teh Poh Teik & Co) for the appellant.
Andi Razalijaya A Dadi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.
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Azahar Mohamed JCA (delivering judgment of the court):

- F** [1] Lim Pah Soon ('the appellant') was charged and tried in the High Court at Shah Alam for trafficking in dangerous drugs, namely 1,563g of ketamine and 52g of nimetazepam, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable under s 39B(2) of the DDA. The offence was said to have been committed on 14 March 2010 at about 5.10pm at a parking lot at Jalan Bunga Tanjung 7, Taman Muda, Ampang, in the District of
- G** Hulu Langat, in the State of Selangor Darul Ehsan.
- [2] The learned High Court judge at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the
- H** DDA. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously allowed it. We now give the reasons of our decision.
- [3] The facts of the case, which the learned judge held made out a prima facie
- I** against the appellant, have been fully set out in his judgment. Very briefly, the facts adduced by the prosecution giving rise to the charge against the appellant were as follows. Acting on information received, DSP Maimunah bt Abu Bakar ('SP2') and a police raiding team carried out surveillance on a Proton Wira bearing Registration No WRK 8963 ('the car') at the targeted area in Taman

Muda. While SP2 was keeping watch, she saw the car heading towards the shop houses and parked in front of a row of the shop houses. The appellant was seen driving the car. No one else was with him at that time. As soon as the appellant had parked the car, SP2 then instructed the driver of her car to block the car driven by the appellant from behind. Almost immediately, SP2 and the other members of the raiding team then rushed to the car. SP2 knocked on the driver's window and identified herself as police and told the appellant to come out from the car. At that point, according to SP2, the appellant attempted to push the door forcibly and tried to escape. The appellant was arrested after he had come out of the car.

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[4] SP2 then inspected the car. SP2 found a plastic package on the front passenger seat. SP2 examined it. The plastic bag had the words 'Thank You' written on it. Inside the plastic bag was a box with the word 'Ribena'. Inside the Ribena box, SP2 found the following items: (a) two packages wrapped in Chinese newspapers, and (b) ten transparent plastic packets containing aluminium foils. In each of the newspaper package were powdery substances suspected to be dangerous drugs. From the ten transparent plastic packets were 100 aluminium foils. Each foil had ten pills also suspected to be dangerous drugs. These two different types of drugs were the subject matter of the charge against the appellant.

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[5] It is the case for the prosecution that the two packages and aluminium foils were later sent to the Chemistry Department for chemical examination and analysis. The contents of the two packages and the aluminium foils were later confirmed by the chemist, Suhana bt Ismail ('SP1'), to be 1,563g of ketamine and 52g of nimetazepam.

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[6] At the conclusion of the case for the prosecution, the learned judge came to the finding that the prosecution had made out a prima facie case against the appellant and therefore called upon the appellant to enter his defence in respect of the offence charged.

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[7] The appellant elected to give sworn evidence. According to him, although he is self-employed, he is also a football bookie. He testified that one Ah Meng had placed bets through him and was indebted to him in about RM80,000. It was his evidence that on the day in question, Ah Meng and his friend had taken a lift in his car after the appellant and Ah Meng had discussed about the debt at a coffee shop where Ah Meng had agreed to pay half his debt first. The appellant further stated that Ah Meng and his friend wanted a lift to the Taman Kencana bus stop which the appellant agreed. Ah Meng sat at the front passenger seat whilst his friend sat behind. The appellant further said that when Ah Meng entered the car, he had with him a red plastic bag. The appellant also said that he dropped off both Ah Meng and his friend at the bus

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A stop. He was unsure whether Ah Meng had brought along the plastic bag as there was a bus behind him when they hurriedly got down from the car and he was not aware of the red plastic bag. The appellant said he never saw the red plastic bag or the Ribena box. The appellant also denied that he tried to escape.

B [8] The appellant called Soo Yoke Hong ('SD2') to corroborate his version. SD2 corroborated about Ah Meng's debt, the meeting at the coffee shop, that Ah Meng was to pay RM40,000 first and that both Ah Meng and his friend got into the appellant's car with Ah Meng sitting behind whilst his friend taking the front passenger seat beside the driver. SD2 also said that he saw Ah Meng had with him a red plastic bag when he got into the car.

C [9] In the course of the arguments before us, what turned out to be one of the most important points raised by learned counsel for the appellant, En Hisyam Teh Poh Teik, was that the learned judge erred when he failed to appreciate that there were serious doubts with regard to the identity of the drugs exhibits (see para 5 of the petition of appeal). Learned counsel argued that the evidence contained in the appeal record ('AR') revealed that there was unexplained serious discrepancy as to the identity of the exhibits in question to the extent that the integrity of the drugs exhibits had been compromised. On the facts and the prevailing circumstances of this case, we find there is merit in this argument.

D [10] Learned counsel had taken us through the evidence of SP2 and the investigating officer, Inspector Mohd Asraf bin Mohd Sikon ('SP5') at pp 19 and 60 vol 1 of the AR. According to SP2 and SP6, the gross weight of the ketamine was 2,000g. However, according to the chemist evidence, through SP1, the gross weight of the ketamine was 2,009.9g (see p 11 vol 1 of the AR). As such, the basic fact that can be gleaned from the evidence is that there was a material discrepancy in that there was an increase of 9.9g of the drugs exhibits in question. This discrepancy goes to the identity of the drugs exhibits.

E [11] To appreciate the argument raised by learned counsel, it is imperative at this juncture that we should highlight a crucial point. The existence of the material discrepancy of the gross weight of the offending drugs was made known to the prosecution during the trial through the testimonies of the relevant prosecution witnesses. Yet, during the trial before the learned judge, no explanation was given by the prosecution to account for this material discrepancy. No evidence was led by the prosecution to explain the discrepancy in weight of the drugs exhibits.

F [12] Even more to the point, this material discrepancy issue was explicitly and distinctly raised by the then learned counsel for the appellant in his submissions at the conclusion of case for the prosecution before the learned

judge (see pp 119–122 vol 2 of the AR). It was argued that the defence of the appellant ought not to be called in respect of the charge for the reason that the non-explanation of the material discrepancy was fatal to the prosecution's case. The identity of the drugs exhibits was a live issue throughout the trial before the learned judge. Tellingly, however, the learned judge never addressed or commented on this issue in his judgment. Now, by virtue of s 180(1) of the Criminal Procedure Code ('CPC'), when the case for the prosecution is concluded, the court must consider whether the prosecution has made out a prima facie case against the accused. Then, s 180(4) provides that a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. Here, we would like to remind all trial judges that in accordance with the provisions of s 180(1) and (4) of the CPC, it is the bounden duty of trial judges to undertake a positive or maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each and essential ingredients of the offence has been established, in order to make a finding whether or not the prosecution has made out a prima facie case against the accused (see *Balachandaran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[13] It is well settled rule that the onus of proving everything essential to the establishment of a charge is upon the prosecution. Now, in the context of the present case, it is trite law that one of the essential ingredients of the offence which the prosecution must prove is that the offending drugs exhibits that were actually seized from the car were the very same exhibits that were analysed by SP1 and confirmed to be dangerous drugs and it was for the trafficking of the same drugs that the appellant was charged with (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551). This is a question of fact. Ultimately, for the purpose of s 180(1) and (4) of the CPC, the learned judge was under a legal obligation to arrive at, and make the necessary finding on this factual issue on the basis of the evidence tendered and the submissions made by the parties before him. It follows from this that once the evidence had been placed and submissions made, there was a statutory duty cast on the learned judge to make a specific finding of facts on the material discrepancy issue raised by the appellant. These are deep-seated expectations not only from the appellant but also from the prosecution before the learned judge. This is acutely important in a case that attracts the mandatory death penalty prescribed by the DDA as in the present case. For that reason, the duty of the learned judge as a trial judge is to ensure that this legal obligation is complied with so as to avoid 'failure of justice' situations. However, as we indicated earlier, the learned judge never addressed or commented on this issue in his judgment. This was never considered by the learned judge and he failed to direct his mind on this point. In our judgment,

- A the failure on the part of the learned judge to take the evidence regarding the material discrepancy into consideration amounted in effect to a failure to consider a defence which had been put forward (see *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238). It was the duty of the learned trial judge to consider that defence, no matter how weak it may be (see *Davendar Singh all Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 3 AMR 489). In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 2 AMR 1135). The learned judge misdirected himself in that he overlooked and failed to appreciate the importance of this issue as it could raise a reasonable doubt on the identity of the offending drugs and hence could consequently raise a reasonable doubt on the prosecution's case.
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- D [14] Still, we also need to consider one further argument advanced by the learned deputy public prosecutor ('DPP'), En Andi Razalijaya bin A Dadi, to the effect that if the learned judge had not considered the material discrepancy issue then we as the appellate court should do so. In this regard, the learned DPP fairly and frankly admitted that there was a discrepancy as to the gross weight of the offending exhibits and that no explanation was given by the prosecution to account for this material discrepancy. However, relying on the case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, it was the learned DPP's argument that even though there existed a discrepancy in the gross weight of the offending drugs exhibits as found by the police and SP1, there was no doubt in the identity of the drugs exhibits as the evidence before the court showed that there was no break in the chain of evidence in respect of the drugs exhibits.
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- G [15] We find ourselves quite unable to agree with the learned DPP's submissions. First and foremost, we are mindful of the principle of law that where there has been a misdirection or non-direction, the conviction will be rendered unsafe unless the Court of Appeal are satisfied that, on the whole of the facts and with a correct direction, the reasonable and proper verdict would have been one of guilty (see *Archbold, Criminal Pleading, Evidence and Practice* (2011 Ed), p 1075 and *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 and the proviso to s 60 of the Courts of Judicature Act 1964). In considering this matter, the authority that we would like to refer is the recent Federal Court decision in the case of *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348 (Federal Court Criminal Appeal No 05–197 of 2011) which was brought to our attention by learned counsel for the appellant. In that case, the gross weight of the cannabis stated by the police was 880g. However, the chemist stated that the gross weight was 829.49g. Furthermore, there were discrepancies as to the number of 'ketulan' of the cannabis seized. There was no explanation given by the prosecution with regard
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to the above discrepancies. The Federal Court held that it was fatal and acquitted both the appellants. Another point that must be mentioned here is that in *Zaifull bin Muhammad v Public Prosecutor*, the prosecution's case against both the appellants was strong as its case was based on the evidence of an agent provocateur. His Lordship Arifin Zakaria CJ in delivering the judgment of the court said:

[33] In the present case, there are two material discrepancies that is as to the number of 'ketulan' and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charged referred to by the learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.

[34] The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.

[35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.

[36] In *Yeong Kia Heng lwn Public Prosecutor* [1992] 1 MLJ 327; [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372, like in the present case, there was a discrepancy in the weight of the drug exhibit between the police and the chemist. The former Supreme Court held that the difference in weight had cast a reasonable doubt on the identity of the drug exhibit. On that premise, the Supreme Court held that the appellant ought not to have been called to enter his defence. Similarly in *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 327; [2009] 4 CLJ 245, the Federal Court again found that because of the discrepancy in weight of drug exhibit as found by the police as against the chemist, the Federal Court held that gave rise to a serious doubt on the identity of the drug exhibit and allowed the appeal by the accused. Zulkefli Makinudin FCJ, in delivering judgment of the court had this to say:

We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (PW3) the total weight of the cannabis is 224.65g. The weight of 224.65g is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08g and the cannabis from the 40 plastic packets which is 73.57g. However, exh P15 (*Borang Serah Menyerah*) stated that the weight of the cannabis to be 140g (on the newspaper) and 65g (in the 40 packets) making the total gross weight to be 205g. This would mean that by the time the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65g.

A [37] Our attention was drawn to the case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345 where the Federal Court held that even though there existed a discrepancy in the weight of the drug exhibit as found by the police and the chemist, the High Court found as a fact that there was no doubt in the identity of the exhibit because the evidence before the court showed that there was no break in the chain of evidence. Having considered these three previous decisions, we agree with the reasoning in *Yeong Kia Heng lwn Public Prosecutor* and *Tan Yew Choy v Public Prosecutor*. In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of 'ketulan'. In our view, these are material discrepancies that go to the issue of identity of the drug exhibit. In the circumstances, therefore, it cannot be said that there is no break in the chain of evidence. On that premise, we hold that it would not be safe to uphold the convictions.

D *Conclusion*

[38] In the upshot, the appeals are allowed and the conviction and sentence imposed by the High Court, which were affirmed by the Court of Appeal, are set aside. The appellants are acquitted and discharged.

E [16] Coming back to the present case, unlike the case of *Zaifull bin Muhammad*, it is true that there is only one material discrepancy as to the gross weight of the drugs exhibits. In our judgment, even though there existed only one material discrepancy in the present case as found by the police and the chemist, which was left unexplained, this created a reasonable doubt as to the identity of the drugs exhibits in question. Under such circumstances, as made clear by the learned Chief Justice, 'it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit'. This extract from the judgment of the learned Chief Justice is very significant principle of law to follow. It is also important to note that the Federal Court in *Zaifull bin Muhammad* referred to the case of *Loh Kah Loon v Public Prosecutor* but prefers the reasoning in both *Yeong Kia Heng v Public Prosecutor* [1992] 1 MLJ 327; [1992] 1 CLJ 364 and *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 245. The ratio decidendi laid down in *Zaifull bin Muhammad* is that an accused person is entitled to any benefit of reasonable doubt from any material discrepancy, which goes to the identity of the drugs exhibits that is left unexplained. Indeed, the dangerous drugs itself (ketamine and nimetazepam in this instant case), constitutes the very *corpus delicti* of the offence and in sustaining a conviction under s 39B(2) of the DDA, the identity and integrity of the *corpus delicti* must be established beyond reasonable doubt. It is pertinent to note that a unique characteristic of dangerous drugs is that they are not readily identifiable as in fact they are subject to scientific analysis by the chemist to determine their composition and nature. Therefore, a standard more

stringent than that applied to cases involving objects which are readily identifiable must be applied. Where there is a material discrepancy in the weight of the drug exhibit as found by the police and the chemist, it is incumbent on the prosecution to explain such discrepancy satisfactorily. Affirmative evidence is required to dispel any lingering or remaining reasonable doubt on the identity of the drugs exhibits. The absence of a reasonable explanation would give rise to a reasonable doubt on the identity of the drugs exhibits. This point has already been made earlier but deserved to be reiterated. Undeniably, *Zaifull bin Muhammad* is the latest Federal Court decision on the issue of identity of drugs exhibits. It represents the law on this subject as we apply today. In this way, the learned DPP's arguments did not overcome the difficulty in the face of the case of *Zaifull bin Muhammad*.

[17] For all these reasons, we had therefore allowed this appeal. The appellant should have been discharged and acquitted by the learned judge without his defence being called on this ground alone. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar

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